

# Exhibit D

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 MADELINE GRULLON, *et al.*,

4 Plaintiffs,

5 v.

23 Civ. 10388 (KPF)

6 DAVID C. BANKS, *et al.*,

7 Defendants.

Oral Argument (Remote)

8  
9 December 19, 2023  
2:04 p.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13 APPEARANCES

14 BRAIN INJURY RIGHTS GROUP, LTD.

Attorneys for Plaintiffs

15 BY: RORY J. BELLANTONI, ESQ.

16 NEW YORK CITY LAW DEPARTMENT

OFFICE OF THE CORPORATION COUNSEL

17 Attorneys for Defendants

18 BY: JAIMINI A. VYAS, ESQ., Assistant Corporation Counsel

THOMAS LINDEMAN, ESQ., Assistant Corporation Counsel

JASON IMBIANO, ESQ., Assistant Corporation Counsel

19 ALSO PRESENT: HANNA GIUNTINI, ESQ.

20 New York City Department of Education

NCJ1GRUA

1 (Case called)

2 THE LAW CLERK: Counsel, please state your names for  
3 the record, beginning with counsel for the plaintiff.

4 MR. BELLANTONI: Good afternoon, your Honor. Rory,  
5 R-O-R-Y, Bellantoni, B-E-L-L-A-N-T-O-N-I, for the plaintiff.

6 THE COURT: Sir, good afternoon, and thank you very  
7 much.

8 Representing the defendants this afternoon?

9 MR. VYAS: Good afternoon, your Honor. This is  
10 Jaimini Vyas for the defendants. I'm joined by Mr. Thomas  
11 Lindeman in my office and by Mr. Jason Imbiano over the  
12 telephone.

13 THE COURT: Okay. Thank you to all of you for  
14 participating. We do have a court reporter on the line, so I  
15 am going to ask you please to be mindful of that and to just  
16 answer questions when you're directed to, and if you haven't  
17 identified yourself and it's not obvious from my question who  
18 you are, if you could just identify yourself.

19 Mr. Vyas, I'm going to begin with you, sir. In  
20 preparation for this proceeding, at about noon today, I  
21 received a letter from you regarding the four cases that are I  
22 believe at issue in this litigation. I'm wondering if you  
23 could explain to me the difference between authorizing or  
24 making payments on a priority basis and making payments on an  
25 ordinary-course-of-business basis. And what I mean by that,

NCJ1GRUA

1 sir, is: What are the different processes, if there are any,  
2 that you have to go through, and what is the anticipated  
3 schedule for payment?

4 MR. VYAS: Your Honor, my understanding is that this  
5 payment, the DOE trying to process this payment as a priority.  
6 That means that they have put every other payment on hold.  
7 They put the processing of other payments, the reviewing of  
8 documents in other cases on hold, and essentially, you know,  
9 this has been put on the top of the pile to be paid out. They  
10 were trying to issue the payment immediately yesterday, but I  
11 was informed that it might take a few days; it might not happen  
12 within 24 hours.

13 THE COURT: How will you know, sir, when that payment  
14 has been authorized?

15 MR. VYAS: Your Honor, our liaison at the DOE would  
16 email us and inform us that that payment has been issued.

17 THE COURT: I see. And so the liaison is constantly  
18 working with your office to let you know when payments are  
19 issued in contested cases?

20 MR. VYAS: No, your Honor, but in this case—

21 THE COURT: Excuse me. Okay. Go ahead, please.

22 MR. VYAS: I apologize, your Honor. So yes, for each  
23 case the liaison is constantly in contact with our office, not  
24 for every student but for cases filed in court; and similarly,  
25 for this case, once the payment is authorized or is issued, the

NCJ1GRUA

1 liaison for this case would email us and inform us that it has  
2 been done.

3 THE COURT: Your answer actually anticipates a  
4 question of mine. Is there a time delay between authorization  
5 and issuance, and if so, is there a typical length of time  
6 between authorization and issuance in priority cases?

7 MR. VYAS: Your Honor, I am actually deferring to  
8 Mr. Lindeman on this question.

9 THE COURT: Okay. That's fine. And Mr. Lindeman is  
10 of course welcome. Because, sir, you just said to me a moment  
11 ago—and this is why I ask—that the liaison at DOE would  
12 advise you of the authorization or issuance, which suggested  
13 that those are two different events.

14 Mr. Lindeman, may I have any insight you may have on  
15 this issue, sir.

16 MR. LINDEMAN: Yes, your Honor. This is Thomas  
17 Lindeman.

18 I think the simplest answer is the authorization is  
19 the process by which DOE reviews documents to determine that  
20 they are accurate and that they correctly, you know, identify a  
21 payment that should be reimbursed. The relevant consideration  
22 here is the IHO order, what it orders to be reimbursed, what  
23 documentation it requires, and what document has been  
24 received—usually, in the case of tuition, which is at issue  
25 here, a tuition affidavit of some variety from the school, as

NCJ1GRUA

1 well as the agreements entered into by the parents to pay the  
2 school whatever the amount is. If all of those documents  
3 align, then the payment is authorized, at which point it is put  
4 through, you know, a traditional processing and simple  
5 bureaucratic monetary processing, that eventually results in a  
6 check being issued or an electronic transfer being conducted.  
7 Those things obviously are somewhat out of the control of the  
8 Department of Education and more left to the banks at that  
9 point, but—so as far as priority, when the DOE prioritizes  
10 something, simply that just means that they are, yeah, as the  
11 city has said, putting other work on hold to make sure that  
12 these payments are approved and that these payments are, you  
13 know, shepherded through the process by which a check is  
14 eventually signed and issued. At that point we usually say  
15 that once something has been authorized, it takes 14 days at  
16 the outside to end up in iBRAIN's bank account. When those  
17 things are being expedited, the goal is to get those done in a  
18 few days or a week. But that's the loose process.

19 THE COURT: Just one moment, please, sir. Thank you.

20 Mr. Lindeman, in your answer to me, you mentioned that  
21 having something designated as priority means that other work  
22 is put on hold in order to make sure that the payment is  
23 approved, or that the request is shepherded through the  
24 process. That would suggest to me, sir, that if something is  
25 in a priority mode, if there were any problems, someone at DOE

NCJ1GRUA

1 perhaps would reach out to someone in your office to coordinate  
2 with getting necessary information from plaintiff's counsel?  
3 Do I understand that correctly?

4 MR. LINDEMAN: That is often the case. The  
5 implementation unit will also reach out directly to either the  
6 provider or plaintiff's counsel in certain circumstances,  
7 depending on sort of the posture of the payment and of the  
8 case, but we will often, you know, pursue multiple angles to  
9 attempt to achieve the same goal.

10 THE COURT: Okay. To the best of your collective  
11 knowledge, is there today documentation that is outstanding and  
12 that is a necessary precondition to reimbursement of tuition in  
13 this case?

14 MR. LINDEMAN: Of tuition, your Honor?

15 THE COURT: Tuition, yes. I know. Transportation and  
16 nursing we'll talk about in just a second. Thank you.

17 MR. LINDEMAN: Yes, your Honor. As I understand it, I  
18 do not believe—I have not been made aware of and I have no  
19 reason to believe at this time that there is any outstanding  
20 documentation relating to tuition.

21 THE COURT: Okay. Then you've anticipated my next  
22 question, sir, which is with respect to transportation and  
23 nursing. I know for the student S.J.D., there was a request on  
24 or about December 18th, which is only yesterday, but to the  
25 best of your collective understanding, are there outstanding

NCJ1GRUA

1 requests or is there a need for documentation for  
2 transportation or nursing for anyone else?

3 MR. LINDEMAN: I believe there is also an outstanding  
4 request for—I'm sorry. I believe that there was an  
5 outstanding request for a further student. I'm trying to  
6 remember. Looking through my notes. It might have been R.P.  
7 I am trying to confirm that. The others, I don't believe so.  
8 The other outstanding payments are mostly related to, you know,  
9 the timing of the recent or more recent findings of fact and  
10 decisions and the fact that there are, beyond these four  
11 students and the other 50 or 60-odd students at iBRAIN, an  
12 additional 15- to 20,000 new process complaints and attendance  
13 pendency and final orders being worked on by the implementation  
14 unit at this time. Those amounts will be paid or, you know, or  
15 further documentation will be requested as they come up, but at  
16 this time those are the only ones that I'm aware of.

17 THE COURT: Okay. And Mr. Lindeman, if you need to  
18 pass the baton as I ask you this question, you'll certainly do  
19 so to Mr. Vyas.

20 With respect, for example, to R.P., there's been  
21 indication that there was a payment of \$149,348.02, in full  
22 satisfaction of the amount owed towards tuition. Is that for  
23 the period of time that ends December 31st? Is that for the  
24 school year? Is that for something else? I'm just trying to  
25 figure out, when payments are being made, whether something



NCJ1GRUA

1 else is left.

2 MR. LINDEMAN: Yes, your Honor. Under the—the amount  
3 for R.P. was for—from 7/5/23 through the end of this calendar  
4 year. I think—I believe that was also the case for the  
5 payment made for L.S. under pendency, though obviously L.S.  
6 received a final order that raises that amount and the  
7 implementation unit is working on reviewing that documentation  
8 and approving those further payments. But the way that  
9 pendency obligations are met is through the end of the year and  
10 then on January 1st through the end of the school, the extended  
11 school year.

12 THE COURT: All right. Thank you.

13 Mr. Bellantoni, I appreciate your patience, sir.  
14 Mr. Bellantoni, have you reviewed the letter that was sent to  
15 me at or about noon today?

16 MR. BELLANTONI: I have had a chance, your Honor, to  
17 review it on my phone in the car, but yes, I have reviewed it.

18 THE COURT: Okay. Reviewed on the phone in the car.  
19 Were you able to see it all, sir? I'm not always able to do  
20 so. That's why I'm asking.

21 MR. BELLANTONI: I was, Judge. I think I was. If I  
22 missed something, I'm sure somebody will let me know, but I was  
23 able to review it, yes.

24 THE COURT: Sir, with respect to each of the students,  
25 there is an explanation given regarding what has happened and

NCJ1GRUA

1 where we are in the process. Is there anything about the  
2 narratives that have been communicated to me about each of  
3 these four students with which you or your clients disagree?

4 MR. BELLANTONI: If I may, your Honor. First, let me  
5 just say—

6 THE COURT: You may.

7 MR. BELLANTONI: —the letter does not explain why  
8 pendency was not paid prior to us filing this complaint for any  
9 of the students. I know there was a payment for L.S. that was  
10 after this lawsuit was filed. So the suit was filed on  
11 November 27th. Nor does it say when payments will be paid  
12 other than the standard language, "in due course."

13 Having said that, let me just address each student  
14 briefly. C.B., there was—

15 THE COURT: Please pause, sir. Thank you. I know you  
16 were participating in this call. This is precisely why I asked  
17 the question of Mr. Vyas and Mr. Lindeman about what being on a  
18 priority was. So as a result of their answers to me, I think I  
19 have a better sense of the time frame. Do you also have a  
20 better sense of the time frame within which authorizations  
21 and/or payments are contemplated?

22 MR. BELLANTONI: I do not, Judge, because of the  
23 following. We were on the phone on Friday. They processed a  
24 \$190,000 payment for L.S. That was made this morning, from  
25 what I understand, is in the portal showing it will be

NCJ1GRUA

1 disbursed tomorrow. With respect to tuition, the other  
2 students still have uncontested tuition payments, yet nothing  
3 went into the payment information portal that the school has  
4 access to—I don't—that would indicate these payments were  
5 approved, being processed, and/or will be disbursed.  
6 Oftentimes—

7 THE COURT: No, no. Mr. Bellantoni, Mr. Bellantoni,  
8 let's try that again.

9 I'm going to skip around a little bit.

10 With respect to the fourth student, initials R.P., do  
11 you agree that tuition has been paid in full?

12 MR. BELLANTONI: For R.P.? Yes, for the first half of  
13 the school year.

14 THE COURT: Yes, sir.

15 All right. So with respect to L.S., you understand  
16 from your clients that there's \$190,000 in the portal for  
17 tomorrow, correct, sir?

18 MR. BELLANTONI: That is correct, your Honor, but—

19 THE COURT: Okay.

20 MR. BELLANTONI: —there have been—

21 THE COURT: No, no. With respect to C.B. I  
22 understand there are no payments for either of those students  
23 just yet, that they are reviewing those materials. So now you  
24 can talk to me about why and to what extent you are still  
25 pursuing a TRO.

NCJ1GRUA

1 MR. BELLANTONI: So, your Honor, for C.B., I believe  
2 the letter indicates that there was an appeal and that payment  
3 was restarting on November 29th, and that it would be processed  
4 in the ordinary course. I still don't know what that means.  
5 They've been in the process since November 29th. All  
6 documentation has been sent several times. I'm not sure why  
7 it's now 20 days and there's not even indication that payment  
8 will be disbursed in a week or two weeks or whenever it is.

9 For the other student we're talking about, S.J.D.,  
10 although there's an indication tuition is a priority, I believe  
11 the letter also talks about an FOFD from November 17th. I  
12 don't know where in the ordinary course—so they talk about as  
13 a priority but will be disbursed in the ordinary course. I  
14 don't know which one that is.

15 THE COURT: Sir, sir, sir—

16 MR. BELLANTONI: And I also made—

17 THE COURT: Sir. Thank you. Please don't talk over  
18 me.

19 With respect to S.J.D., they say they're working to  
20 authorize the tuition as a priority and the transportation and  
21 nursing in the ordinary course of business.

22 MR. BELLANTONI: Okay. I apologize. I didn't have  
23 that in front of me right now. But if I can address—

24 THE COURT: I see. Go ahead.

25 MR. BELLANTONI: I don't know if I can move to the

NCJ1GRUA

1 transportation at this point, your Honor. There was a  
2 representation that documents were requested yesterday. I'm  
3 not saying they weren't, but I wasn't copied on that email,  
4 number one; number two, the DOE is taking a position I suppose  
5 now that there are documents in this case that need to show  
6 when the student actually took the bus, and that is not what  
7 the FOFD says. The FOFD provides that transportation shall be  
8 funded in an amount of \$111,180. That's a set amount  
9 consistent with the transportation agreement that provides  
10 transportation for the number of public school days in a school  
11 year whether or not there's actually a ride taken. So this is  
12 a case, like R.P.—R.P.'s transportation agreement as part of  
13 pendency specifically says—or the order, I should say, the  
14 pendency order—that transportation shall be funded pursuant to  
15 the agreement in a total amount for 219 days in a school year,  
16 177,390. That's from the 22-23 school year, but forms the  
17 basis of pendency for this year.

18 So I have some sense that the DOE is working towards  
19 payment. Again, as far as when that will be, as far as what  
20 the emergency is, as far as the tuition goes, my  
21 understanding—and I've only had this information, obviously, a  
22 short time, but the school took a bridge loan, was able to  
23 secure a bridge loan that comes due this week—not sure if it's  
24 tomorrow or the next day—that did cover the payroll for  
25 Friday, but that loan requires that it be paid back, as I said,

NCJ1GRUA

1 tomorrow or the next day. So there still is an urgency. I  
2 don't know if other monies have come in since Friday on other  
3 cases that somewhat mitigate that urgency, but from what I  
4 understand, your Honor, there still is the urgency because this  
5 loan has to be paid back and this money would be used to pay  
6 the school's expenses and/or secure another bridge loan, given  
7 that the lender has some certainty that money would be payable  
8 within a certain time frame.

9 THE COURT: Mr. Bellantoni, are the nursing and  
10 transportation expenses paid by iBRAIN and then reimbursed to  
11 iBRAIN or are the nursing and transportation expenses paid by  
12 DOE directly to the service providers?

13 MR. BELLANTONI: They're paid by DOE directly to the  
14 service providers.

15 THE COURT: Okay. So do I understand, therefore, that  
16 deficiencies with respect to nursing and transportation would  
17 not cause your client to be unable to meet its payroll?

18 MR. BELLANTONI: Well, my—again, I don't represent  
19 iBRAIN. It would interfere—the deficiencies, if the services  
20 are suspended, will result in my clients not being able to  
21 access—in the case of transportation, given that they're  
22 wheelchair bound and require special vans, would not be able to  
23 access the school; and nursing is something that they get on a  
24 1:1 basis in school because many of the students have G-tubes  
25 or other issues with breathing and/or swallowing that require a

NCJ1GRUA

1 1:1 nurse with them all day long. From what I understand,  
2 though, however—

3 THE COURT: Mr. Bellantoni, no one is disputing that.  
4 Mr. Bellantoni, your irreparable harm argument to me and the  
5 basis for your TRO was that the failure of DOE to make payments  
6 for tuition to iBRAIN was causing iBRAIN to teeter on the brink  
7 of insolvency and to possibly shut down. So I don't believe  
8 you've yet told me that there is a bus company that says, we  
9 will not pick up these four children this week, or ever, nor do  
10 I believe you've told me that there is a nursing outfit that  
11 has said, we will not be there for R.P. or L.S. Do you have  
12 evidence that one of the transportation providers or that one  
13 of the nursing providers has said that they will cut off  
14 services for a student as of a particular day?

15 MR. BELLANTONI: Your Honor, I do apologize because  
16 these cases are bleeding together, but there are students who  
17 have received letters from transportation and nursing—I  
18 believe in this case transportation. I don't have the  
19 complaint, unfortunately. But yes, there were similar letters  
20 that the transportation company, if they didn't receive payment  
21 within a certain time frame, might not be able to provide  
22 transportation. Nursing as well.

23 To answer your other question—and I apologize I  
24 didn't do this, but—nonpayment to nursing provider or  
25 transportation will not affect iBRAIN's ability to operate. I

NCJ1GRUA

1 believe that was the question, and that is the answer, Judge.

2 THE COURT: And that is the concern that I have. Once  
3 again, I appreciate that your clients wish to be paid, and I  
4 appreciate that they wish to be paid in a timely fashion, and  
5 actually, you're going to tell me again that your clients are  
6 the parents, but really—well, you're going to keep telling me  
7 that, sir, but your motion speaks in terms of the precarious  
8 financial condition of iBRAIN and not the precarious financial  
9 condition of any of the parents here. We are here for a TRO,  
10 and whether or not there is a likelihood of success on the  
11 merits, and I'm still evaluating that. One of the things that  
12 you led with in your papers is the idea of irreparable harm,  
13 and the irreparable harm was that these children were not going  
14 to get any education because the school was going to close  
15 down. So if the tuition payments are being made, then I don't  
16 think you have that irreparable harm argument. And to the  
17 extent what you're saying to me is that you don't know what  
18 priority means, I don't know that it would be appropriate for  
19 me, for example, to force DOE to cut a check or to make an  
20 electronic funds transfer today or tomorrow. That may be what  
21 you're ultimately asking for. But I guess I'll hear from you  
22 more on that point, sir.

23 MR. BELLANTONI: Your Honor, I'm asking for, if not  
24 the immediacy—my understanding again from the school is it  
25 would be easier or they would be able to get the financing they



NCJ1GRUA

1 need if there were an ordinary course. So if it's not an order  
2 by tomorrow, by Friday, by next Monday, something the DOE would  
3 have to comply with that would inject some certainty for the  
4 parents in this case to know that these students will not be  
5 displaced by the lack of funding.

6 As far as the TRO, I'm approaching it from a little  
7 bit different standard. In *Mendez*, the Second Circuit talked  
8 about the 1415(j) automatic injunction, and although they said  
9 it's not automatic when it comes to payments for private school  
10 placement, the parents may be able to request that automatic  
11 injunction, that injunction under 1415(j) when placement is in  
12 jeopardy because of a delay or nonpayment. So even consistent  
13 with the DOE's course, pendency is usually and typically not  
14 paid this late for the first half of the school year. My  
15 understanding from the school, this has placed them in  
16 jeopardy. In jeopardy of—they have already missed one  
17 payroll, November 15th, and they're trying to keep this payroll  
18 up. The reason it sounds like I'm representing the school is  
19 because the school doesn't single out these students, and if  
20 the school closes, then none of my clients have their  
21 educational placement, one that was ordered by the  
22 administrative officers for last year. So I know that the TRO  
23 and the preliminary injunction standard—I know what they  
24 require, but this motion or this request is—also considers  
25 what the Second Circuit said in *Mendez*, and even though they

NCJ1GRUA

1 didn't talk about irreparable harms, they talked about a  
2 likelihood of jeopardy or being at risk in the placement.  
3 Almost presumes that if—

4 THE COURT: But sir, what are the component—I hear  
5 you, and I too have read *Mendez*. Thank you very much. But  
6 what are you suggesting? I mean, the tuition payments are, as  
7 I understand it, they're on their way to being paid on a  
8 priority basis. That leaves you with transportation and  
9 nursing services. Are you suggesting that the record in this  
10 case is such that I can make a finding under what was left open  
11 in *Mendez* based on the transportation and the nursing services?

12 MR. BELLANTONI: Your Honor, again—and I apologize.  
13 If the letters that I were discussing were exhibits to this  
14 complaint, I would say yes. I would say that it would be  
15 obviously within your discretion to decide how quickly those  
16 payments would be made. If those letters are not in this  
17 complaint, then the urgency has not been set out the way it has  
18 been for the tuition, your Honor.

19 THE COURT: Okay. Sir, I'm just trying to find the  
20 letters of which you speak, so one moment, please.

21 MR. LINDEMAN: Your Honor, this is Thomas Lindeman.  
22 Could I briefly—they're actually exhibits 1-7 and 1-8 to the  
23 complaint, but—1-7 and 1-8 on the docket. But I actually  
24 have—

25 THE COURT: Yes, I'm—

NCJ1GRUA

1 MR. LINDEMAN: —something to say about these letters,  
2 briefly.

3 THE COURT: One moment, sir, because I'm trying to get  
4 to these letters. Excuse me.

5 I'm at 1-7 right now. May I ask again, was that  
6 Mr. Lindeman or someone else?

7 MR. LINDEMAN: Yes, your Honor.

8 THE COURT: Thank you, Mr. Lindeman. I'm looking at  
9 1-7 right now, which is from B&H Healthcare Services. Yes.

10 MR. LINDEMAN: Yes. Both of these documents, document  
11 1-7 and document 1-8, are from B&H Healthcare Services, Inc.,  
12 d/b/a Park Avenue Home Care. They are both from November 28,  
13 2023. One of them purports to be addressed to Ms. Maria  
14 Hidalgo; the second one purports to be addressed to Mr. Patrick  
15 Donohue. My concern, your Honor, these documents are—certain  
16 elements of the information of them have been blacked out, it  
17 appears—again, obviously to protect the identity of the  
18 students. That's perfectly fine. But the last paragraph of  
19 both letters says, "Unfortunately, we must require these  
20 balances to be paid within 30 days or may no longer be able to  
21 provide Sebastian with nursing services." Now—

22 THE COURT: And Sebastian is none of the children in  
23 this case?

24 MR. LINDEMAN: That's correct, your Honor. Now I am  
25 aware that there is also the issue that Mr. Donohue's letter is

NCJ1GRUA

1 addressed, "Dear Ms. Revis." So I don't know which plaintiff  
2 that is. But the reality is, these letters do not have much  
3 credibility, in my mind. Again, these payments are being  
4 processed, no one is trying to prevent B&H Healthcare Services,  
5 Inc., d/b/a Park Avenue Home Care, from receiving the amounts  
6 that they are entitled to under these IHO orders. But I do not  
7 believe that these letters are credible in any way.

8 THE COURT: All right. Mr. Lindeman, I'm not agreeing  
9 or disagreeing with you at this point. Let me ask a slightly  
10 different question, which is: The IHO case numbers that are  
11 listed on each of these two letters, are they correct?

12 MR. LINDEMAN: The S.J.D. number appears to be  
13 correct.

14 Yes, the IHO case numbers may be correct, though I  
15 don't know if the amount outstanding is correct. I don't have  
16 that in front of me. I believe that the case numbers match the  
17 address—plaintiffs at the top, though again, the fact that one  
18 letter appears to be sent to Mr. Donohue but addresses  
19 Ms. Revis and speaks to the services to a student who is  
20 uninvolved in this case may call some of that into question.  
21 Nevertheless, Mr. Donohue's case number seems to correlate with  
22 the student.

23 THE COURT: Mr. Lindeman, a separate question for you.  
24 According to Mr. Bellantoni, there is no need for the  
25 substantiation that your client is seeking because at least in

NCJ1GRUA

1 one case, the FOFD sets the amount. In fact, I think in two  
2 cases, the FOFD sets the amount. So there's no checking to be  
3 done, says Mr. Bellantoni.

4 MR. LINDEMAN: In the case of C.B. and in the case of  
5 R.P., I believe, we have—as we stated here, those documents  
6 are being reviewed and processed, at least in terms of—I mean,  
7 I do not believe we're disagreeing about any further  
8 documentation related to specifically nursing. The only  
9 documentation that we're disagreeing about is transportation.

10 In the L.S. case, I think it says not to exceed an  
11 amount, and it also has the language of to and from the  
12 child—from the child's home to the school, which, in certain  
13 cases, including the *Davis* matter which Judge Furman decided  
14 earlier this year, the court has acknowledged has to mean  
15 something, and what that has been taken to mean, at least by  
16 the Department of Education and by certain judges and IHOs, is  
17 that amount is supposed to be the upper limits of an amount  
18 that would be reached if the student went to school every  
19 single day. Again, obviously the details and the specific  
20 language of these orders is not necessarily what we are here to  
21 debate, and if proper documentation has been provided, these  
22 payments will be made. But—

23 THE COURT: So Mr. Lindeman, when you speak about C.B.  
24 and R.P. and you say that with respect to nursing, your client  
25 has all the documents it needs, I don't know what "ordinary

NCJ1GRUA

1 course of business" is, and Mr. Bellantoni, understandably, is  
2 noting that we've gone, you know, 20 days, several weeks, and  
3 nothing's been paid. And I understand he was at that point  
4 speaking about a tuition issue. But I don't know what  
5 "ordinary course of business" is. You sort of suggested to me  
6 that priority can be two weeks but you try and get it done  
7 within a week. What is "ordinary course of business"? Is it a  
8 month?

9 MR. LINDEMAN: "Ordinary course of business" is—in  
10 terms of the time line, "ordinary course of business" is simply  
11 how long it takes the Department of Education to review every  
12 single, you know, impartial administrative order that comes in  
13 as well as the attendant documents provided by plaintiff. I  
14 don't have directly in front of me the dates that documentation  
15 was provided for these things. And I'm not a hundred percent  
16 certain—previously, in prior years, the way that plaintiff  
17 provided documentation for nursing and for transportation was  
18 monthly. We received an affidavit at the beginning of the year  
19 that detailed supposedly how much nursing and/or transportation  
20 costs would be for the entire year, and then at the end of  
21 every month, we would receive an invoice for that month  
22 detailing what services were used for that month. And  
23 occasionally we would come in, you know, run into an issue at  
24 the end of the year when certain, you know, amounts would—some  
25 invoices would come in all at once, and the eventual total

NCJ1GRUA

1 amounts of the invoices for the extended 12-month school year  
2 would not line up with the affidavit that we'd been provided at  
3 the beginning, and we'd request documentation to be corrected,  
4 to make sure those numbers line up, that the amounts were  
5 actually sent, that the student actually received those  
6 services.

7 But in this case, I know—in this school year, I know  
8 that the transportation company has moved to some sort of  
9 three-times-a-year installment plan, so I believe that we  
10 received documentation for these students who we are not  
11 seeking attendance records for, which is, again, a bit of a  
12 different can of worms because iBRAIN apparently doesn't keep  
13 tuition records, which is a different issue, but we I believe  
14 received the first two but not the last installment—invoices.  
15 Those are being processed and reviewed.

16 But also, there are only so many people that work at  
17 IU. They are working on every single one of these impartial  
18 hearing officer decisions that we receive, not just iBRAIN  
19 students. These are also the students going to Gersh and  
20 Manhattan Child Center and Reach for the Stars and, you know,  
21 any number of other state-approved and nonstate-approved  
22 private schools, all of whom need services and are entitled to  
23 reimbursement. So the ordinary course is simply those people  
24 who have schedules and they have—and they are working very  
25 hard but they also need to eat and sleep sometimes.

NCJ1GRUA

1 THE COURT: Well, Mr. Lindeman, just following on the  
2 last point that you're making—not the eating and sleeping  
3 point, sir, but I guess the point before that—

4 MR. LINDEMAN: Sure.

5 THE COURT: —earlier it was suggested to me by you  
6 and your colleague that taking something as a priority meant  
7 basically moving it to the top of a pile. I'm sensing from the  
8 answer you just gave me that that pile is quite a large one and  
9 that your position would be—and I might disagree with it, but  
10 I want to hear it—that there's only so many things that I can  
11 order your client to move to the top of the pile because every  
12 time I did that, I would be displacing some other equally  
13 worthy school from getting its bills paid. Do I understand  
14 that to be your argument?

15 MR. LINDEMAN: Your Honor, I think that is a real  
16 concern that we have. Last week we discussed—you'd brought  
17 up, you know, the *L.V.* decision that issued earlier this year.  
18 And I assume your Honor is aware and interested in what's going  
19 on with that. The special master released his impartial report  
20 a few weeks ago for the first one—maybe a little longer than a  
21 few weeks ago, but not—but relatively recently, and he speaks  
22 very highly in that report of the implementation unit and their  
23 efforts to improve these processes and get payments made faster  
24 and to meet the obligations laid out by Judge Preska earlier  
25 this year. But he also notes that the implementation unit is



NCJ1GRUA

1 beset by competing priorities from multiple sides. Every time  
2 we get one of these preliminary injunction matters from  
3 plaintiff's counsel and every time we, you know, receive an  
4 order to move something to the top, that's another competing  
5 priority. All of these students matter. All of these students  
6 are entitled to services and entitled to these payments. No  
7 one is contesting any of that. But this is the at least  
8 seventh preliminary injunction that plaintiff's counsel has  
9 brought, and this motion plaintiff's counsel has brought this  
10 year related to payments. We had an additional six or seven  
11 that were specifically seeking pendency determinations, and we  
12 had a few that were for an individual student that has morphed  
13 into SRO appeals that we're also dealing with. It is  
14 overwhelming, the amount of pressure that has been placed on  
15 both the Department of Education and, bluntly, this office, the  
16 law department, by these cases. Even if we all wanted—we all  
17 want all of these to be at the top of the pile. But  
18 someone—but if that happens and then, you know, in the *DeJesus*  
19 *Rodriguez* case, which I know your Honor is set to receive  
20 papers on later this week, if that goes on the top of the pile,  
21 will this case now be right below that on the pile?

22 THE COURT: All right. Mr. Bellantoni, sir, thank you  
23 very much. I'll hear from you now.

24 MR. BELLANTONI: Your Honor, the problem is there is  
25 communication between the DOE and our office, the law

NCJ1GRUA

1 department and our office, and attempts to resolve these cases.  
2 Every time we've filed an action, we have discussed with the  
3 law department that we're going to file it if we don't get some  
4 indication, just what is the due course, where are we in the  
5 pile. I get there's a pile, but these children are in the pile  
6 too. And I can't help but, again, recognize that payments for  
7 the kids in all these cases we brought, none of them were  
8 made—let me qualify that. There may be some, but the vast  
9 majority—30 out of 32 or 33—were not made until we bring an  
10 action. We're not told that it will be another month; we're  
11 not told where in the pile we are. We send documentation—we  
12 sent documentation in August, then again in October, then again  
13 there was a demand yesterday. We provide documentation as soon  
14 as we can; the school does; the other folks do when they can.  
15 Then we get in these situations like S.J.D., where the FOFD  
16 clearly rejects the per diem payment basis and says, pay us  
17 total amount of \$111,000 for transportation, and that means the  
18 219 school days in the public school year. I've conceded where  
19 the orders say paid for only rides used or only rides provided,  
20 and trying to, with my client in those cases, get documentation  
21 together to provide it to the DOE. No judge has yet said "to  
22 and from" means specifically you should only pay for rides  
23 actually used. Judge Furman and Judge Cronan remanded the  
24 matters to the IHOs. The IHOs that have limited payment for  
25 transportation to rides used have been overruled by the state

NCJ1GRUA

1 review officers in the Department of Education. Officers—it's  
2 either Crowak (ph) or Bates and SRO Harrington have both  
3 rejected this per diem payment. It doesn't go on for  
4 education. They paid for the tuition. If they deprived my  
5 clients of a FAPE, they paid for tuition, what the cost is.  
6 The excessiveness of tuition is litigated at the administrative  
7 level. I get there's a certain amount of checking to be done,  
8 but what's being lost here—and perhaps because I'm not  
9 articulating it the correct way—is that these cases are vetted  
10 by the administrative offices. If they felt that tuition was  
11 excessive, they would say so. Or they have, for whatever  
12 reason, said rides should be actually provided. If we don't  
13 appeal that order, Judge Schofield in one case said that's the  
14 order we're stuck with. So you have to show that the child  
15 attended school. None of these cases are that. The FOFDs.

16 THE COURT: Okay. But Mr. Bellantoni, I just have to  
17 stop you for a moment. The reason I'm not focused on  
18 transportation right now—although I appreciate everything  
19 you've just said to me—that doesn't sound like that's the big  
20 issue in this case. So you've given me nothing to suggest—at  
21 least I'm not seeing anything that suggests—that a child is  
22 not going to get transportation because they haven't paid the  
23 transportation. What I'm seeing right now, sir, is I see two  
24 rather suspect letters from B&H Healthcare Services, which is  
25 about the nursing. I've just been told by Mr. Lindeman that

NCJ1GRUA

1 there are amounts that they believe they have all the paperwork  
2 for, so I see those. But if we're talking about  
3 transportation, I don't think I have a record to issue a TRO  
4 based on the failure to pay transportation costs. Tell me if  
5 there's something here I should be looking at. But I just  
6 don't see it here.

7 MR. BELLANTONI: There is nothing more than we  
8 discussed, your Honor. That's correct. I can only work with  
9 what is and that is what is. The bigger problem here has been  
10 the tuition.

11 THE COURT: Yes, sir.

12 MR. BELLANTONI: Well, I—I'm sorry. I didn't want to  
13 speak over you, Judge.

14 THE COURT: No, no.

15 MR. BELLANTONI: And the declaration that I've gotten  
16 from Mr. Mielnik is obviously much more detailed than anything  
17 that we submitted from the other two providers. I would just  
18 also note, Mr. Mielnik was—

19 THE COURT: I'm sorry. Mr. Bellantoni, I'm so sorry.  
20 You cut out for a moment, sir, when you were talking about the  
21 declaration. I'm sorry. I missed everything that you said  
22 about it.

23 MR. BELLANTONI: Simply saying, your Honor, the  
24 declaration does create that urgency. It is the focus of this  
25 motion. More than the other two areas. I'm agreeing with the

NCJ1GRUA

1 Court. So yes, that would be the answer to your question,  
2 Judge.

3 THE COURT: Okay. Thank you. One moment, please.

4 All right. Thank you. Mr. Bellantoni, was there  
5 something else you wanted to say in reply to all of the  
6 information I received from Mr. Lindeman?

7 MR. BELLANTONI: Judge, only that a lot of the  
8 discussion about paperwork, consistent with your statement a  
9 moment ago, there's also transportation and nursing. Very  
10 rarely, if ever, is the tuition called into question. There  
11 are affidavits. There are contracts. There are no limitations  
12 with transportation. So again, from my perspective, there is  
13 no reason why it takes us filing a lawsuit to get the DOE  
14 moving on that issue. I can accept that we're in the pile, but  
15 there's never any discussion as to where we are in the pile,  
16 and the special master's last report is not as flattering as  
17 counsel indicates, still talks about the delays and the  
18 unacceptable delays in payment that leaves parents—parents  
19 like the parents here—questioning and not knowing what the  
20 state of, you know, their child's placement is going to be from  
21 month to month, or at least from one semester to the next. So  
22 it is a problem. And I would prefer not to be here arguing  
23 this motion, Judge, if I didn't have to be. It's not like I  
24 run to court for no reason. We have no payments made until the  
25 lawsuits are initiated. That's the DOE's track record. And if

NCJ1GRUA

1 it changes, I won't bring these lawsuits. But if it doesn't,  
2 I'm not sure what I'm supposed to do as an advocate for the  
3 children.

4 Thank you, Judge.

5 THE COURT: One moment, please.

6 Mr. Bellantoni, do you represent students at schools  
7 other than iBRAIN?

8 MR. BELLANTONI: We do represent some of the students  
9 at some points in time when they go back to iHope. Sometimes  
10 they get separate counsel after they go back, sometimes they  
11 stay with us for a while. We represent students in other  
12 states, so obviously they're not in iBRAIN. Florida,  
13 Connecticut. We've started actions in California. So there  
14 are students at other schools, and if students came to us from  
15 other schools, we would represent them as well, yes, Judge.

16 THE COURT: Let me explain why I'm asking the  
17 question, sir. Several years ago your perhaps former colleague  
18 Mr. Ashanti brought a whole bunch of cases as a result of the  
19 iHope-iBRAIN schism, and they were predicated on what  
20 ultimately was a flawed view of pendency, and we dealt with  
21 them, and I had four or five of them myself. And now I have  
22 several more requests for emergent relief coming from iBRAIN,  
23 and I'm just trying to figure out whether there's any other  
24 school that has such rotten luck in dealing with DOE, because,  
25 for example, the Gersh school that was mentioned by

NCJ1GRUA

1 Mr. Lindeman, I have nothing from them. I've never gotten  
2 anything from them. The Manhattan center that I'm not even  
3 remembering the full name of to which you referred, I have  
4 nothing from them either. So, I mean, when I'm getting cases  
5 with TROs, it's frequently iBRAIN, and I'm just trying to  
6 figure out, what is it about the relationship between that  
7 school and DOE that has resulted in so much litigation. And  
8 you were hinting at it earlier, I suppose, when you said that  
9 you feel that—or the school feels that DOE doesn't listen to  
10 you unless you file a lawsuit. But I'm concerned if I'm going  
11 to have this from every other school providing these services.  
12 So do you have any other thoughts as to what it is about iBRAIN  
13 that is yielding or results in these lawsuits?

14 MR. BELLANTONI: Judge, I can only say that my  
15 experience started in 2018 when I joined iBRAIN. I didn't have  
16 much, if any, educational experience before that, especially in  
17 New York City. So I deal closely with iBRAIN, and I—Judge, I  
18 don't have—any theory I have, I'm not sure folks would agree  
19 with. To me, there obviously seems to be some bad blood  
20 between these two. Again, I'm not bringing lawsuits where  
21 pendency has been paid. I understood *Ventura de Paulino*, and  
22 I'm not sure where I would have come down in that case prior to  
23 joining the firm. Obviously that was different. There was  
24 pendency, and iHope, the attorney there wanted iBRAIN to be on  
25 a substantially similar basis. And the Second Department said,

NCJ1GRUA

1 no, you don't have any right to run from one school to another  
2 and proclaim pendency simply because it's similar. This is  
3 different, Judge. These cases, these students have pendency  
4 orders for iBRAIN, and yet there's delay, there's these  
5 requests for documentation, despite the fact that documentation  
6 is provided. I don't know if there is bad blood between—in my  
7 personal opinion, it seems there is bad blood between the DOE  
8 and the school. And I'm not sure at this point which side  
9 makes it worse. I'm not sure if they're engaged in a death  
10 battle and struggle between the two on a daily basis. All I  
11 can see is what's happening with these students. And I know  
12 the implication is I represent the school. Honestly, I do not  
13 represent their interests. At certain times they're aligned,  
14 they're the same. The fact that they need to get paid to  
15 educate my clients is important, but what I'm looking at,  
16 Judge, is my students. These students shouldn't have their  
17 education interrupted, you know, if the DOE and the school  
18 can't get along. They need to figure this out. Judge, was it  
19 Broderick, I think recently ordered us to sit down with folks  
20 from the DOE and iBRAIN and transportation to try to hash out  
21 what's going on here. Some parts of the meet-and-confer were  
22 helpful, some not so much. But as I said, they're not at play  
23 here. I am open to anything I can do in any case going forward  
24 to avoid coming here and litigating. Whether the law  
25 department wants to have the particular individual, wants to



NCJ1GRUA

1 meet with other parents, not just me, other clients, other  
2 attorneys, anything I can do, Judge. But to answer your  
3 original question, seems that there is some residual  
4 consternation, for lack of a better word, between iBRAIN and  
5 the DOE, and these kids are getting caught up in the middle of  
6 that. And whenever a lawsuit is brought by me, there is some  
7 looking backwards to other lawyers who were at the school at  
8 some point in time and is this litigation similar. These are,  
9 as I look at them, completely different litigations, Judge.

10 *[Unintelligible]*

11 THE COURT: I'm not hearing the last thing you said.

12 MR. BELLANTONI: I'm just trying to differentiate  
13 Ventura and the first flood of cases from what's happening  
14 here, Judge.

15 THE COURT: Okay. Thank you.

16 Mr. Lindeman, you also I believe have been witness to  
17 history here. Do you wish to speak to these issues? Because I  
18 don't think it's good for any of us involved in this litigation  
19 to be involved in a series of preliminary injunctions and  
20 temporary restraining orders based on pendency or based on  
21 payments. So what is the problem between your client and  
22 iBRAIN that these payments are not going through? Because  
23 ultimately, in the letter I received from Mr. Vyas today, they  
24 were due.

25 MR. LINDEMAN: Your Honor, I can't speak to any bad

NCJ1GRUA

1 blood. I don't necessarily know that—certainly I don't think  
2 the DOE appreciates being sued regularly, but I don't—but no  
3 one is trying to prevent these students from receiving services  
4 or put the school out of business, as I think I was accused of  
5 a few weeks ago by Mr. Mielnik, or any number of other issues.  
6 The reality is I just don't think—like, while I'm sure that  
7 outside of the city the Brain Injury Rights Group does  
8 represent other students at other schools, I'm not aware of any  
9 lawsuits that they've brought on behalf of any other—or any  
10 students attending any other school in the city, or in the  
11 Southern District or the Eastern District, and I don't know of  
12 any firm that is bringing these types of motions in that—in  
13 this way. Certainly, you know, the Cuddy Law Firm does not  
14 bring motions in this way; Elisa Hyman's law offices; Gary  
15 Mayerson. We obviously have a lot of—there's a strong parents  
16 bar, and in many ways that is good. They function as a private  
17 attorney general in the way they are supposed to. But no one  
18 else is bringing preliminary injunction motions and TROs and  
19 consistent repeated cases, bringing cases in the summer seeking  
20 a pendency order, and bringing cases in the fall seeking a  
21 pendency payment. And in the next 30 minutes or so I'll be  
22 traveling to Brooklyn to meet Mr. Bellantoni, which is why I  
23 believe he was driving in his car while reading our letter, so  
24 we can do this all over again, and I just don't know that we're  
25 necessarily accomplishing all that much by doing that. But

NCJ1GRUA

1 that's how it's been the last year or two.

2 THE COURT: All right. Thank you. I've heard enough.  
3 Thank you all very much.

4 I am denying the TRO because based on the record  
5 before me, I don't think there's a basis for me to grant the  
6 TRO either under *Mendez* or under the traditional factors for  
7 determining or giving preliminary injunction. And in  
8 particular, that's because, with respect to the tuition, the  
9 letter that I received from Mr. Vyas today indicates to me that  
10 tuition payments are being processed, they're being put even on  
11 a priority track, and that they're going to be paid soon, and  
12 that really is the issue that was presented to me in the  
13 complaint.

14 I want to pause for a moment here and say that I'm not  
15 actually sure I agree with the underlying concept of  
16 plaintiff's litigation, which is that if the school starts  
17 feeling financial pressures and has difficulty making payroll,  
18 that somehow that allows for injunctive relief. I'm worried  
19 about where that actually leads to logically, because if for  
20 whatever reason iBRAIN is not financially stable, either  
21 because it's a relatively new school or because its finances  
22 aren't well administered or any other reason, I'm not sure that  
23 that fact—its financial instability—should somehow cause its  
24 students to be treated differently or with greater priority  
25 than anybody else.

NCJ1GRUA

1 But putting that to the side for the moment, the issue  
2 for me is that there are four students who are before me. It  
3 appears that the tuition payments are not disputed; it appears  
4 that either they've been paid, they've mostly been paid, or  
5 they're on their way to being paid, and they're going to be  
6 placed on a priority basis.

7 With respect to the issue of the nursing and the  
8 transportation services, I have the same concerns about the  
9 letters, those supporting letters from B&H that Mr. Lindeman  
10 has, which is they're form letters for which I really don't  
11 have any substantiation and the student's name is different and  
12 the addressee's name in one case is different. So maybe they  
13 are legitimate, maybe they're correct, but I'm not willing to  
14 put a TRO in place for that reason.

15 And with respect to the transportation, again, I don't  
16 have any indication that one of these four students was going  
17 to lose their transportation, or indeed that they're going to  
18 actually lose their nursing services, enough that I'm going to  
19 impose a TRO.

20 So for those reasons I'm denying a TRO in this case.  
21 But that, of course, is not the end of the issue because there  
22 is as well a request for a preliminary injunction. And I guess  
23 what I'd like to do is, just as Mr. Lindeman, and perhaps even  
24 Mr. Bellantoni, have no great desire to be meeting with a  
25 different judge every single day to try and figure out what the

NCJ1GRUA

1 underlying problem is between iBRAIN and DOE, I am not looking  
2 forward to redoing this in about two weeks, but it seems that  
3 that's where we are, because there is a request for a  
4 preliminary injunction, and I set something if only so that  
5 then Mr. Vyas will tell me how much closer we are to these  
6 folks getting paid.

7 So Mr. Bellantoni, is it still your wish, sir, to  
8 pursue a preliminary injunction in this case?

9 MR. BELLANTONI: Not—yes, your Honor.

10 THE COURT: All right. My recollection is that for  
11 the *Rodriguez* case, that's on the calendar for January 5th, but  
12 let me please look at my calendar, which I'm trying to do as I  
13 talk to you.

14 I do. I have it for 10:30 a.m. Am I right? Do I  
15 have that correct, Mr. Bellantoni, Friday, the 5th, at 10:30?

16 MR. BELLANTONI: Yes, Judge.

17 THE COURT: Okay. Then I'll be putting this on for  
18 January 5th, at 10:30 as well, and we'll see where we are at  
19 that point, on January 5th.

20 Friends, I know you have other judges to go see.  
21 Mr. Vyas, I'm going to ask you to order, please, a transcript  
22 of this conference in the ordinary course.

23 I'll let you all go. Thank you very much. Happy  
24 holidays to you all. We're adjourned.

25 ALL COUNSEL: Thank you, your Honor.

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